Supreme Court, U.S.
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No. 88-729

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1988

ROBERT ROWE ET AL.,

Petitioners,

V.

ALLIED CHEMICAL HOURLY EMPLOYEES' PENSION PLAN ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS ALLIED CHEMICAL HOURLY EMPLOYEES' PENSION PLAN AND ALLIED CORPORATION

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QUESTIONS PRESENTED

1. Whether there are grounds to overturn the factual finding of the lower courts that Allied did not unilaterally amend the Allied Chemical Hourly Employees' Pension Plan by virtue of the sale of Allied's Ashland, Kentucky coke plant to Armco, Inc.

2. Whether there are grounds to overturn the factual finding of the lower courts that the Allied Plan Administrator's interpretation of the Plan's "layoff provision" was neither arbitrary nor capricious.

3. Whether the arbitrary and capricious standard of review was properly applied to the Allied Plan Administrator's denial of benefits to be paid from assets held in trust under a funded plan.

4. Whether there are grounds to overturn the factual finding of the lower courts that 29 U.S.C. § 1058 was not violated because the transfer of assets from Allied to Armco resulted in an equivalence of benefits before and after the sale.

5. Whether there are grounds to overturn the factual finding of the lower courts that Allied did not make misrepresentations to Petitioners concerning the Social Security provisions of the Armco Plan.

6. Whether the lower courts correctly held that Petitioners who were not Armco employees and who never became participants in the Armco Plan lack standing to sue Armco Respondents for breach of fiduciary duty.

LISTING OF PARTIES

Statement Pursuant to Rule 28.1

1. Respondent Allied Corporation was a subsidiary of Allied-Signal Inc. On September 30, 1987, Allied Corporation was merged into Allied-Signal Inc.

Allied-Signal Inc. has no parent company. Allied-Signal Inc.'s subsidiaries (except wholly owned subsidiaries) and affiliates are:

Allied-General Nuclear Services
ACE, Limited
Allied Holdings (UK) Limited
Bendix HVCG Europe Limited
Ferranti-Bendix Power Generation Limited
Jurid Werke, GmbH
Ingold Electrodes, Inc.
Enscor Inc.
Sonic Oil Separation, Ltd.
Allied Automotive Ltda.
Bendix France, S.A.
Amoricaine de Fonderia-Le Chatelet, S.A.
Bendix Deutschland GmbH
Bendix Electronics, S.A.
Bendix Ricambi, S.p.A.
Cierock Ricambi, S.p.A.
Dipra Ricambi, S.p.A.
Bendix Portuguesa Sociedede de Equipamentos Automoveid, Ltda.
Bronzavia Air Equipment, S.A.
D.B.A. S.I.B.E., SNC
France Automobile Service, S.A.
Freudenberg, S.A.
Iminor, S.A.
Societe Civile Immobiliere Prieur & Cie
La Decoration Moderne, S.A.
Sifra Industries, S.A.

Societe Civile Immobiliere due 60 Av. De La Grandee Armee
TENSA, S.A.
Transpar Iberica, S.A.
Bendix Italia, S.p.A.
Bendix Altechna Freni, S.p.A.
Bendix Mexicana, S.A. de C.V.
Bendix Pemsa Cinturones de Seguridad, S.A. de C.V.
FIAAM, S.p.A.
Garrett GmbH
Garrett Productos Automotrices S.A.
Turbo Services SNC
Sistemas Bendix de Seguridad S.A. de C.V.
Allied-Signal Flight Systems Company
Kalyani Brakes Limited
Bendix Electronics Korean, Limited
Bendix Electronic Service Corporation de Espana, S.A.
Bendix Espana, S.A.
Bendix-Jidosha Kiki Corporation
Bendix Mintex Proprietary Limited
Bendix Group Superannuation Pty., Ltd.
Bunker Ramo Electronic Data Systems S.A.
Chico Corporation
Compania Industrial de Fluorita, S.A.
Compania Metalurgica de Parral, S.A.
Garrett Comtronics Licensing Corp.
Globe Auto Electricals, Ltd.
Hankuk Brake Industrial Co., Ltd.
Industrial Turbines International Inc.
International Turbine Engine Corporation
Jidosha Kiki Co., Ltd.
Kanto Seiatsu Kogyo Co., Ltd.
Tokyo Chuzsho
Leaseway All-Services, Inc.
Manbritt Industries, Inc.
Nippon Amorphous Metals Co., Ltd.
Nirlon Synthetic Fibres and Chemicals, Ltd.
Normalair Garrett (Holdings) Ltd.

Dynamic Turbocharger Services Pty., Ltd. Queensland
Asia Pacific Resin Corporation
Doosan Electro-Materials Co., Ltd.
Financiere Allied-Signal S.A.
Nittobo-Norplex/Oak Inc.
Norplex/Oak India Ltd.
Oak Mitsui Inc.
Bendix Electronics, S.A.
Prestolite of India Ltd.
Quimobasicos, S.A.
Propelentes Mexicanos, S.A.
Sifra Industrie, S.A.
Societe Anonyme des Usines Chausson [SECAN]
Societe Wheelabrator-Allevard S.A.
Sofratype, S.A.
Synektron Corporation
Union Texas Petroleum Holdings, Inc.
UOP
Nikki/Universal Co., Ltd.
UM Holdings B.V.
Serind S.p.A.
UMMS Caribbean N.V.
Ataisa S.a.c.i.
Tecpro Industrial Chemicals Ltd.
UOP Management Services (Saudi Arabia) Limited

2. Respondent Allied Chemical Hourly Employees' Pension Plan has no parent companies, subsidiaries, or affiliates to list pursuant to Rule 28.1.

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BRIEF IN OPPOSITION FOR RESPONDENTS ALLIED CHEMICAL HOURLY EMPLOYEES' PENSION PLAN AND ALLIED CORPORATION

Respondents Allied Chemical Hourly Employees' Pension Plan and Allied Corporation (collectively "Allied") respectfully request that the petition for certiorari filed by Robert Rowe *et al.* be denied.

STATEMENT OF THE CASE

The facts underlying this litigation are set forth in the opinion of the Court of Appeals. The facts cited by the Court were largely derived from joint Stipulations of Fact which were submitted by the parties in lieu of a trial.[1] Allied Respondents submit the following supplemental statement to clarify the nature of the claims and proceedings below.

[1] The parties' Stipulations of Fact are reproduced in Allied's Appendix. References to the stipulations are by page and paragraph, e.g., Allied App. 3, Stip. 1.

I. Factual Statement

The Allied Chemical Hourly Employees' Pension Plan (the "Allied Plan") is a collectively bargained pension plan which covered those employees at Allied's Ashland, Kentucky coke plant represented by the Oil, Chemical & Atomic Workers Union ("OCAW"). (Allied App. 3a, Stip. 4).

Under a Sales Agreement negotiated by Armco and Allied in late 1981 for the sale of the Ashland facility, Armco assumed responsibility for normal retirement benefits for those Allied employees who accepted Armco employment. (Allied App. 4a-5a, Stip. 8-9). In addition, Armco agreed to preserve and provide early retirement benefits, including an 80-point pension, for those Allied employees eligible for early retirement under the terms of the Allied Plan as of December 31, 1981, the closing date of sale. Allied agreed to transfer to Armco funds equivalent to the actuarial value of the benefits earned by those Allied employees who went to work for Armco; for each employee for whom funds were transferred, Armco agreed to credit service earned under the Allied Plan for eligibility and vesting. (Allied App. 5a-6a, Stip. 10). Allied transferred some $5 million to Armco to fully fund these benefits for the former Allied employees. (Allied App. 6a-7a, Stip. 11-14).

Those Allied employees who were not hired by Armco or who chose to retire from Allied at the time of sale continued to be covered under the Allied Plan. Consequently, Allied employees who were on layoff status prior to the sale continued to accrue service credit under the Allied Plan. (Allied App. 13a, Stip. 39).

Allied representatives met with OCAW prior to the sale to describe the pension provisions of the Sales Agreement. (Allied App. 9a-10a, Stip. 21-22). Allied did not propose to OCAW any amendments to the Allied Plan nor did it modify the Plan unilaterally. The Allied Plan has continued in existence during the time period relevant to this litigation with no substantive changes. The only modifications since the Plan was collectively negotiated in 1981 have been technical amendments required to comply with changes in the law. (J.A. 137).[2]

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[2] "J.A." refers to the joint appendix in the Court of Appeals.

Those employees who were eligible for an 80-point pension were counselled individually by Allied and advised that they could elect to retire under the Allied Plan prior to the sale; alternatively, they could elect guaranteed employment with Armco, have pension assets transferred to the Armco Plan on their behalf, and thereafter retire with an 80-point pension under the Armco Plan. The employees were specifically advised that the Armco Plan did not contain a provision equivalent to the Social Security leveling option in the Allied Plan. (Allied App. 10a-11a, Stip 24-25).

The Group 1 Petitioners were not eligible for an 80-point pension at the time of sale. Some three years following their employment by Armco, Group 1 Petitioners demanded payment of an 80-point pension by the Allied Plan. (Allied App. 12a, Stip. 34).[3] They claimed that the sale effected a layoff which entitled them to continuing service credit under Article IX(4)(a) of the Allied Plan. The Group 1 Petitioners' pension claims were denied by the Allied Plan Administrator on the grounds they were no longer participants in the Allied Plan when they sought a pension, the obligation to pay their Plan benefit was assumed by Armco, and they were not laid off from Allied's employ. (Allied App. 12a, 3b, Stip. 35 and Ex. B to Stip. of Fact).

The Group 2 Petitioners were eligible for an 80-point pension at the time of sale. To receive the pension, they need only retire under the Armco Plan. (Allied App. 14a, Stip. 50). Group 2 Petitioners nonetheless applied for an 80-point pension from the Allied Plan in 1984. (Allied App. 14a, Stip. 46). The Allied Plan Administrator denied their claims because they had not elected to retire or receive a deferred vested benefit while they were Allied employees and participants in the Allied Plan, and because provision was made to pay their benefits under the Armco Plan. (Allied App. 14a, 9b, Stip. 46-47 and Ex. E to Stip. of Fact).

The Group 3 Petitioners, who are receiving retirement benefits under the Allied Plan, claim they were wrongfully induced to retire by representations that the Social Security option would be unavailable if they accepted Armco employment and became participants in the Armco Plan. The Armco Plan contained no Social Security option in 1981, and all communications by Armco to

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[3] Petitioners Rowe and Duncan filed claims for an 80-point pension in 1983. (Allied App. 12a, Stip. 31-32).

Allied prior to the sale were that no Social Security option would be provided. (Allied App. 16a-17a, 19a, Stip. 62, 65, 68, 69, 91). Armco did not decide to provide the option until receipt of a demand letter from Petitioners' counsel nearly a year after the sale. (Allied App. 19a, Stip. 90, 92).

II. Decisions of the Lower Courts

Because there were no disputed issues of fact requiring determination by a fact-finder, the parties advised the District Court that they wished to stipulate the facts and submit the case to the court on the record without need for a trial. (Allied App. 1a-2a). Thereafter, a decision favorable to Allied and Armco was rendered in the District Court on motions and cross motions for summary judgment. (Pet. App. 13a-21a, 31a-36a).

A unanimous panel of the Court of Appeals for the Sixth Circuit affirmed the District Court's decision, holding as follows: 1) the Allied Plan Administrator's conduct in denying the Group 1 and Group 2 Petitioners' 80-point pension claims was not arbitrary, capricious, or in bad faith, and therefore did not violate Section 404 of ERISA, 29 U.S.C. § 1104 (Pet. App. 6a-7a); 2) Allied did not unilaterally amend the Allied Plan to eliminate the Group 1 and 2 Petitioners' 80-point pensions, in violation of Section 404 of ERISA (Pet. App. 7a-8a); 3) Allied's transfer of assets to Armco to fund the Group 1 and 2 Petitioners' pensions did not violate Section 208 of ERISA, 29 U.S.C. § 1058 (Pet. App. 8a-9a); and 4) Allied accurately advised the Group 3 Petitioners regarding the availability of the Social Security option under the Armco Plan, and therefore did not breach fiduciary duties under Section 404 of ERISA or common law duties. (Pet. App. 9a-10a). Without discussion, the Court of Appeals dismissed the Petitioners' remaining contentions as meritless. (Pet. App. 12a).[4]

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[4] Petitioners' reproduction of the Court of Appeals' decision contains a typographical error which substantively alters the Court's decision. The third sentence of the last paragraph under Part IV, page 9a of Petitioners' Appendix, should read as follows:

> The Group 2 plaintiffs were entitled to an 80-point pension under the Allied Plan before the transfer, and they are now entitled to an 80-point pension under the Armco Plan.

REASONS FOR DENYING THE WRIT

The petition for a writ of certiorari should be denied because the questions presented for review involve reconsideration of factual issues determined below on a stipulated record. Petitioners' assertion that the decision below departed from the usual course of judicial proceedings is completely unsubstantiated; nor do Petitioners describe any genuine conflict between the holdings below and the decisions of other courts of appeals. Further, the decision of the Court of Appeals was without error and presents no significant issues meriting this Court's review.

I. THE PETITIONERS SEEK REVIEW OF FACTUAL FINDINGS BASED ON STIPULATED FACTS AND LIMITED TO THE PARTICULAR CIRCUMSTANCES OF THIS CASE.

Petitioners seek review of the factual findings reached by the District Court and affirmed by the Court of Appeals as not clearly erroneous. They ask this Court to reverse the lower courts' findings that the Allied Plan was not amended as a result of the plant sale; that the Plan Administrator's interpretation of the layoff provisions of the Allied Plan was consistent with past practice and was a reasonable interpretation of the Plan; that the transfer of assets from Allied to Armco resulted in an equivalence of benefits before and after the sale; and that Allied accurately represented the absence of a Social Security provision under the Armco Plan.

The disposition of these questions hinges in large measure on the interpretation of the Allied Plan and the Sales Agreement between Allied and Armco. This document review has already been undertaken, with unanimity of opinion on the correct interpretation, by the Plan Administrator, a United States Magistrate, the District Court and the Court of Appeals. Further, because the documents reviewed have application only to the unique circumstances presented by this case, there is no question of general public interest requiring this Court's attention. The decision below has a practical impact only on the litigants in this suit.

Moreover, a review of the lower courts' factual findings is particularly inappropriate since the findings were largely based on a stipulated record. Although Petitioners had an opportunity to

request a hearing on any material controverted fact, they did not do so. No reason exists meriting this Court's review of the factual determinations of the lower courts.

II. THE DECISION BELOW IS NOT IN CONFLICT WITH THE DECISIONS OF ANY OTHER COURT OF APPEALS.

Although Petitioners allege conflicts between the decision below and the decisions of other courts of appeals as grounds for the Petition, they fail to identify any real conflict on the same issue of law.

A. The Interpretation of the Allied Plan Rests on Circumstances Unique to this Case and Presents No Conflict in Decisions.

Petitioners assail the interpretation of the layoff provision of the Allied Plan as being in conflict with the interpretations of other courts. Yet the decisions cited, *Anderson v. Ciba-Geigy Corp.*, 759 F.2d 1518 (11th Cir.), *cert. denied*, 474 U.S. 995 (1985), and *Blau v. Del Monte Corp.*, 748 F.2d 1348 (9th Cir. 1984), *cert. denied*, 474 U.S. 865 (1985), involved interpretation of the particular plan documents at issue in those cases. In *Anderson*, the court found that a fair reading of the severance benefit plan *supported* the administrator's interpretation that employees who were retained by the purchaser following the sale of a business were not entitled to severance benefits from their former employer. 759 F.2d at 1522-1523.

Blau v. Del Monte Corporation, *supra*, differs in outcome only and does not create a conflict on a matter of law or fact. In *Blau* the appeals court reversed the lower court's summary judgment for the employer based upon evidence of "wholesale and flagrant" procedural violations of ERISA. In particular, the employer's concealment of its severance pay plan precluded it from interpreting the plan to deny benefits. 748 F.2d at 1353, 1355-1356.

In this case, the decision below was based upon the Allied Plan language, Allied's treatment of employees who were on layoff status at the time of the sale, past interpretations of the Plan, and the provisions in the Sales Agreement for transferring service

credit for employees who went directly to Armco. (Pet. App. 6a-7a, 33a-34a, 40a-41a). The lower courts found *no* violations by Allied of ERISA's procedural requirements. The petition presents no conflict with the *Blau* or *Anderson* decisions and no question requiring review by this Court.

B. The Application of the Arbitrary and Capricious Standard of Review Does Not Present A Conflict.

There is no genuine conflict over the appropriate standard of review. Petitioners' assertion that the Sixth Circuit defied its own precedent by applying the arbitrary and capricious standard to review of a plan administrator's denial of benefits does not merit response. (Pet. 13-14). Petitioners reach this conclusion only by reciting different formulations of the same standard.

Further, the decisions from other courts of appeals cited by Petitioners concern fundamentally different issues. *See Bruch v. Firestone Tire and Rubber Co.*, 828 F.2d 134 (3d Cir. 1987), *cert. granted*, ___ U.S. ___, 108 S.Ct. 1288 (1988); *Haeffele v. Hercules Inc.*, 839 F.2d 952 (3d Cir. 1988).[5] They involve the standard of review applicable to denial of benefits to be paid from the general assets of an employer rather than from assets held in trust under a funded plan. The benefits at issue in this case fall within the latter category.

In *Bruch*, the Court of Appeals reasoned that the plan administrator may have a conflict of interest if the administrator is also the employer and the plan at issue is unfunded, so that any benefits paid pursuant to the plan are paid directly by the employer out of general corporate funds. 828 F.2d at 138. The Court found that the deferential arbitrary and capricious standard is inappropriate where the employer who made the challenged decision is not protecting the rights of other beneficiaries but is the party who profits from the denial of benefits. 828 F.2d at 144-145.

The facts of this case are entirely distinguishable. The Allied Plan is a funded plan and therefore the Allied Plan Administrator's decision to deny benefits does not affect Allied's general funds.

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[5] In *Gilbert v. Burlington Industries, Inc.*, 765 F.2d 320 (2d Cir. 1985), *aff'd mem.*, 477 U.S. 901 (1986), the appeals court did not address the issue of the appropriate standard of review when the plan administrator has a financial interest in the outcome of a decision.

Moreover, because Allied Plan assets were transferred to Armco to fund retirement benefits for the Group 1 and Group 2 Petitioners, awarding a duplicate pension from Allied would have depleted the *Allied Plan's* assets, not Allied's general funds.

Petitioners' attempts to bring this case within the scope of the *Bruch* opinion rest upon speculative factual assertions which are not part of the stipulated record and were not raised below. The Petitioners' unsupported claim that the Allied Plan Administrator had a "great financial interest" in resolving pension issues in connection with the sale of the Ashland Coke Plant, and their speculation that pension issues "could have been a stumbling block" to the sale, do not support the heightened scrutiny espoused by the Third Circuit in *Bruch*. Under Petitioners' theory, every corporate transaction which touched on an ERISA-covered plan would provide an occasion for *de novo* review of a plan administrator's denial of benefits, regardless of whether the employer stood to gain financially from the decision. The *Bruch* court's rationale for *de novo* review does not encompass such a speculative and generalized financial interest.

C. The Court of Appeals' Interpretation of Section 208 of ERISA is Not Contrary to the Decisions of Other Courts.

The holding of the Court of Appeals that the transfer of assets did not violate Section 208 of ERISA, 29 U.S.C. § 1058, presents no conflict warranting review.

In support of their contention that Section 208 was applicable because the 80-point pension was a nonforfeitable, accrued benefit, Petitioners cite *Amato v. Western Union International, Inc.*, 773 F.2d 1402 (2d Cir. 1985); *Hoover v. Cumberland, Maryland Teamsters Pension Fund*, 756 F.2d 977 (3d Cir. 1985); and *Shaw v. International Association of M. & A.W. Pension Plan*, 750 F.2d 1458 (9th Cir. 1985). None of these decisions involved the interpretation of Section 208; therefore, they do not present a conflict on the question of statutory interpretation before the Court of Appeals. Further, they present factual circumstances distinguishable from this case. *Amato* concerned a plan amendment resulting in partial termination of a pension plan under Section 4044 of ERISA; *Hoover* and *Shaw* involved the amendment of a plan's normal retirement benefit pay-

able at normal retirement age. *See Amato,* 773 F.2d at 1416; *Hoover,* 756 F.2d at 982; *Shaw,* 750 F.2d at 1464.

In any event, the resolution of the applicability of Section 208 to the 80-point benefit was unnecessary to the decision below. The Court of Appeals assumed without deciding that Section 208 was applicable; it went on to find that the statutory language requiring equivalence of benefits was satisfied because the Petitioners were eligible to receive the same benefit immediately before and immediately after the sale. (Pet. App. 8a-9a). Petitioners attack these findings as "blatant factual oversights." (Pet. 15). The Court's findings are fully supported by the record, however, and Petitioners' claim of error is simply a repetition of their challenge to the findings of fact below. No conflict in decision is presented.

III. THE DECISION BELOW WAS WITHOUT ERROR.

There is no basis for the Court to grant certiorari because the decision below was manifestly correct.

The Court of Appeals' application of the arbitrary and capricious standard of review was consistent with precedent in the Sixth Circuit and with the overwhelming weight of authority from other courts of appeals. *See, e.g., Varhola v. Doe,* 820 F.2d 809, 812-13 (6th Cir. 1987); *Holland v. Burlington Industries, Inc.,* 772 F.2d 1140, 1149 (4th Cir. 1985), *aff'd sub nom. Brooks v. Burlington Industries, Inc.,* 477 U.S. 901 (1986); *Berg v. Board of Trustees, Local 705,* 725 F.2d 68, 70 (7th Cir. 1984). Because the Group 1 and 2 Petitioners alleged that the Allied Plan Administrator's failure to pay the 80-point benefit constituted a breach of fiduciary duties (Pet. 7), the Court's finding that the benefit denial was not arbitrary and capricious also disposed of the fiduciary claim.

The remaining claims were dismissed based upon the factual findings of the District Court. Rejection of the Section 208 claims rested upon undisputed facts that Group 1 and 2 Petitioners were entitled to identical retirement benefits immediately before and immediately after the transfer of assets. Group 3 Petitioners' claims that they were wrongfully induced to retire were found to be wholly at odds with uncontroverted facts that Allied did not misrepresent the provisions of the Armco Plan. The claimed unilateral amendment of the Allied Plan was also dismissed on fac-

tual grounds; rather than amending the Plan in any respect, the Court found that Allied's interpretation "merely gave substance and effect to existing provisions." (Pet. App. 8a).[6]

Finally, the question of the applicable statute of limitations raised by Petitioners was dismissed without discussion by the Court of Appeals. (Pet. 17). It was unnecessary for the Court to consider the issue because OCAW's claims of breach of a collective bargaining agreement were considered on their merits by the District Court and rejected. An issue which was unnecessary to the disposition of the case below and is not referenced in the opinion does not call for resolution by this Court.

It bears emphasis that no Petitioner lost any benefit to which he was entitled at the time of the sale of Allied's Ashland facility. Not only were all such benefits preserved, but Petitioners who went to work for Armco were presented with the opportunity to earn enhanced benefits. Petitioners, however, seek more than their entitlement. The Group 1 Petitioners demand an early retirement benefit for which they were never eligible, while Group 2 Petitioners demand from Allied a benefit which duplicates the pension to which they are entitled upon retirement from Armco. The Group 3 Petitioners, who demand back wages for jobs with Armco which they did not accept because they elected to retire, are receiving benefits under the Allied Plan and have no claim for additional benefits under either company's plan.

These facts present no questions meriting this Court's review.

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[6] Group 2 Petitioners claim in this Court that they were given the choice of employment with Armco or an immediate pension from Allied and that this *characterization* of their options amounted to a Plan amendment. (Pet. 8). The Court of Appeals specifically found to the contrary: "If the Group 2 plaintiffs wanted the 80-point pension, yet still wanted to work for Armco, they could have retired from Allied and then sought employment with Armco. Instead, they chose guaranteed employment with Armco . . . ." (Pet. App. 7a).

CONCLUSION

The petition for writ of certiorari should be denied.

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Dated: November 23, 1988

CERTIFICATE OF SERVICE

I, Christine H. Perdue, Counsel for the Respondents, Allied Chemical Hourly Employees' Pension Plan and Allied Corporation, and a member of the Bar of the Supreme Court of the United States, hereby certify that I have served all parties required to be served by depositing three copies of the foregoing Brief in Opposition for Respondents Allied Chemical Hourly Employees' Pension Plan and Allied Corporation in the United States Mail, first class postage prepaid, this 23rd day of November, 1988 addressed to: Donald J. Mares, Esq. McKendree, Toll & Mares, 1244 Grant Street, Denver, Colorado, 80203; John W. McKendree, General Counsel, Oil, Chemical and Atomic Workers International Union, P.O. Box 2812, Denver, Colorado, 80201; Bernard J. Casey, Esq., Reed, Smith, Shaw & McClay, 1150 Connecticut Avenue, N.W., Suite 900, Washington, D.C. 20036.

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
ASHLAND DIVISION

ROWE, ET AL.,)
Plaintiffs,)
v.)
ALLIED CHEMICAL HOURLY)
EMPLOYEES' PENSION PLAN, ET AL.,)
Defendants.)

CIVIL ACTION NO. 83-282

OIL, CHEMICAL AND ATOMIC WORKERS)
INTERNATIONAL UNION, ET AL.,)
Plaintiffs,)
v.)
ALLIED CORPORATION, ET AL.,)
Defendants.)

CIVIL ACTION NO. 84-278

STIPULATIONS OF FACT

This stipulation is submitted in accordance with the Court's order of November 25, 1985.

Plaintiffs are divided into three groups. Group 1 consists of the so-called lay-off plaintiffs. Group 2 consists of the pre-sale 80-point plaintiffs. Group 3 consists of the Social Security option plaintiffs.

On December 23, 1985 plaintiffs filed with the Court a Motion to Amend Complaint and their proposed Amended Complaint. The proposed Amended Complaint contains a Count V-A which asserts for the first time claims on behalf of the Group 3 plaintiffs against the Armco defendants. The Armco defendants presently are studying the proposed Amended Complaint and are preparing an Opposition to the Motion to Amend which they expect to file by January 10, 1986 when it will be due under Local

Rule 7(c)(1). In the circumstances the Armco defendants do not stipulate that the record herein, including the instant stipulation, is sufficient to enable the court to dispose of the claims which Group 3 plaintiffs seek to assert against the Armco defendants in Count V-A of the proffered Amended Complaint.

Subject to the exception with respect to the claims of the Group 3 plaintiffs against the Armco defendants, it is the belief of the parties that as supplemented by these stipulations, the record including the interrogatory answers, admissions and depositions and affidavits previously filed in this case is sufficient to enable the Court to decide this matter on the defendant's Motion to Dismiss or for Summary Judgment and/or the Plaintiffs' Cross-Motion for Summary Judgment, now pending before the Court, without a trial. In accordance with the Court's Order, the parties will submit supplemental briefs on or before January 31, 1986. The parties have asked the Court for leave to submit briefs in response within 15 days after service of the supplemental briefs. The parties have also asked the Court to supplement its November 25 Order to allow a limited hearing to enable the Court to decide material issues, should there be issues of fact that cannot be stipulated.

For purposes of this matter only, the parties stipulate that the following facts are true:

A. BACKGROUND

1. This matter arises out of the sale by defendant Allied Corporation ("Allied") to defendant Armco Inc. ("Armco") of a coke-producing facility in Ashland, Kentucky. The terms of the sale are contained in a written agreement dated December 31, 1981, executed by appropriate officials of Allied and Armco ("the sales agreement"). The sales agreement contains certain provisions intended to govern pension benefits for former Allied coke plant employees hired by Armco. These provisions are incorporated in Sec. 2.05 of the sales agreement.

2. Until December 31, 1981, Allied owned and operated a coke-producing facility in Ashland, Kentucky. Hourly employees working for Allied at said facility were represented by Plaintiffs

Oil, Chemical and Atomic Workers International Union, AFL-CIO and its Local 3-523 ("OCAW").

3. During the years the OCAW represented Allied's hourly employees at the coke plant, their terms and conditions of employment were governed by successive collectively bargained agreements between Allied and the OCAW. The agreement in effect at the time of the sale was executed on August 5, 1979 and had an expiration date of May 14, 1982 ("the 1979 Agreement").

4. Pension benefits for Allied hourly employees at the coke facility, including the individual Plaintiffs, were governed by the Allied Chemical Corporation Hourly Employees' Pension Plan ("The Allied Plan"). As applied to the coke plant, the Allied Plan is a collectively bargained agreement whose terms were negotiated by the OCAW and Allied separately from the 1979 Agreement. The terms of the Allied Plan in effect at the time of sale became operative at the coke plant under a letter-agreement, dated May 12, 1981, executed by Allied and the OCAW. Under the letter agreement, the expiration date of the Plan at the coke plant is October 21, 1986.

5. Three provisions of the Allied Plan are involved in this litigation. Article IV(2)(a) describes eligibility requirements for what is commonly known as an "80-point" unreduced early retirement pension, as follows:

> An employee . . . may retire at his option, provided (a) his age and the number of years of his credited service with the Company, when added together, equal or exceed 80 . . .

Article IX(4)(a) describes the computation of credited service with Allied for the purposes of determining 80-point pension eligibility for employees who are laid off, as follows:

> If an employee is laid off for any reason within three years of the date that he would be eligible to retire under Article IV(2)(a) hereof, he will receive credit for the period of layoff from the effective date up to the date his age and years of credited service, including such period of layoff, equals 80.

Article VII provides for an optional method of leveling a pensioner's income throughout the retirement years by taking into

account the pensioner's Social Security income (the so-called "Social Security" or "level income" option), as follows:

> An employee retiring under the provisions of Article IV(2a) or (2c) hereof before he first becomes eligible to receive Social Security payments may elect to receive an actuarially equivalent retirement income providing larger monthly payments, in lieu of the retirement income otherwise payable upon early retirement, until the date he first becomes eligible to receive Social Security payments; thereafter, his monthly payments shall be reduced by the approximate amount of his monthly Social Security benefit. Insofar as practical, therefore, a level total retirement income will be available for the pensioner.

6. At all times relevant hereto, defendant Armco has owned and operated a steel-making facility in Ashland, Kentucky, known as the Ashland Works. Hourly employees working for Armco at the Ashland Works are represented by the United Steelworkers of America ("USWA"). Those employees are participants in a pension plan negotiated between Armco and the USWA, the Armco Inc. Pension Agreement Plan ("the Armco Plan"). Armco and the Armco Plan are defendants in Case No. 84-278 only.

7. The Armco Plan did not contain provisions equivalent to the provisions of the Allied Plan quoted in paragraph 5, *supra.*

8. The actual sale of the Ashland coke facility by Allied to Armco was preceded by over a month of negotiations between Allied and Armco. One area of negotiation concerned pension benefits for hourly coke plant employees. Two options were considered. One option was for Allied and the Allied Plan to retain pension liability and related plan assets for benefits earned in Allied service by Allied employees, regardless of whether or not those employees went to work for Armco upon, or following, the sale. The other option was for Allied to transfer pension assets and liabilities to Armco for those Allied hourly coke plant employees who went to work for Armco.

9. During negotiations, Armco and Allied determined that the sales agreement would be written according to the second option, i.e., the liability to pay the benefit attributable to credited ser-

vice under Allied employment would be transferred to Armco and the Armco Plan together with assets to cover those liabilities for former Allied employees who went to work for Armco.

10. Pursuant to Section 2.05 of the December 31, 1981 sales agreement, Allied and Armco agreed to do the following with respect to the pensions of those Allied hourly coke plant employees who went to work for Armco on or after the sale without retiring from Allied service:

(a) Armco agreed to preserve and provide early retirement (including the 80-point) pension benefits under the Armco Plan for those employees eligible for early retirement under the terms of the Allied Plan as of the closing date of sale (i.e., December 31, 1981), as follows:

> Eligibility for commencement of the Allied pension plan benefit payable upon early retirement shall be preserved and provided under the respective Purchaser's plan for such persons as are eligible under the respective Allied plan on the Closing Date . . . (§ 2.05-(f)(iii))

(b) Allied agreed to transfer from its Plan to the Armco Plan funds equivalent to the actuarial present value on the respective "Payment Date" of the pension listed for each Allied employee hired by Armco ("the Transfer Value") (§ 2.05(c), (d));[1]

(c) Armco also agreed that former Allied hourly coke plant employees, following employment by Armco and the transfer of pension assets on their behalf, would be entitled to certain pensions, payable by the Armco Plan, as follows:

> (f) For each person for whom a Transfer Value is received:

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[1] The mechanism established by the sales agreement addressed not only the pensions for those employees hired by Armco immediately upon the sale but also the pensions for those employees who were on layoff from Allied at the time of the sale and who might be recalled by Armco within three years of the sale. The "Payment Date" would, therefore, vary according to the respective employee's date of hire by Armco.

(i) Service credited under the respective Allied pension plan for eligibility or vesting shall be credited for like purposes under Purchaser's respective plans;

(ii) The benefits to be provided under the Purchaser's respective plan shall be the greater of: (1) the benefits, if any, regularly provided under such plan based on service credited under the respective Allied plans plus service with Purchaser or (2) the pension shown in Item 8 of Exhibit R (reduced, if such pension begins before Normal Retirement Date, in accordance with the terms of the respective Allied Pension plan as of the Closing Date, based on eligibility for pension as of the Closing Date and age as of the date such pension begins) plus the benefit, if any, regularly provided under Purchaser's plans for service with Purchaser. (§ 2.05(f)(i), (ii)). [2]

11. Subsequent to the sale, funds were transferred according to section 2.05(c) of the sales agreement. The actual transfers were in two forms, direct plan-to-plan transfers and company-to-company transfers.

12. On March 31, 1982 the Allied Plan transferred $4,135,828 in pension reserves to the Armco Plan to fund pension benefits, including 80-point pension benefits, for those eligible employees who were hired by Armco as of the sale date.

13. In addition to the transfer of reserves from the Allied Plan to the Armco Plan, Allied paid Armco $1.051 million in cash to fund pension benefits, including 80 point pension benefits, for those eligible employees.

14. Thereafter, Allied made transfers from Plan to Plan and in direct cash payments every six months up to December 31, 1984 to fund benefits for those former Allied hourly employees recalled from layoff by Armco during each six-month period.

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[2] Exhibit R to the sales agreement was a list provided by Allied to Armco showing coke plant employees who were employed by Allied at the coke facility immediately prior to dates of sale or who were on leave or layoff from Allied with rights of return or recall as of the date of sale. Item 8 of Exhibit R specified, for each employee listed, the "[u]nreduced accrued monthly pension payable on Normal Retirement Date under the respective Allied pension plans."

15. The initial and the subsequent company-to-company transfers were negotiated amounts of cash intended to compensate for actuarial concerns, including, principally, concerns regarding 80-point pensioners, the risk of future wage increases credited to all years of Allied/Armco service, and the risk that employees would retire earlier than the assumed dates used to compute the Transfer Values.

16. The transfer value for each former Allied hourly employee hired by Armco was calculated by Allied and Armco actuaries to be 25.43234% greater than the value of the accrued benefits determined under PBGC regulations governing payment of premiums, 29 C.F.R. Part 2610. Plaintiffs do not stipulate that the calculation of the accrued value of benefits under 29 C.F.R. Part 2610 was correct.

17. In calculating the transfer value for each former Allied hourly employee, Allied's actuary made the following proposal, which Armco and Allied adopted:

> . . . it is our opinion that the amount of the payment from Allied's pension plans ought to be no more and no less than the value of the accrued benefits determined pursuant to Part 2610, Chapter XXVI, of Title 29 CFR, i.e., the value that the PBGC would assign for employer liability purposes were all accrued benefits guaranteed for PBGC purposes.
>
> We have determined that amount, for all the employees [salaried and hourly] [3] . . . based on the plans having a normal retirement age of age 65 and based on a December 31, 1981 plan termination date, to be $5,979,319. The portion of this related to the [hourly and salaried employees hired by Armco] is $5,372,273. Accordingly, $1,236,445 should be transferred from the Allied Salaried Pension Plan and $4,135,828 should be transferred from the Allied Hourly Pension Plan to the appropriate Armco plan. The portion of this amount for each employee is shown on the enclosed listing.

[3] No claims are made in these consolidated actions on behalf of salaried employees.

> You have requested us to prepare a list of actuarial assumptions to support the aggregate Transfer Value of $7.5 million. This will require additional time. We believe the end product of such effort would be Transfer values which are fairly uniformly higher than the PBGC values. In the interest of time and efficiency, therefore, we respectfully propose that the Transfer Value for each Ashland employee be 125.43234% of the amount shown on the enclosed list.

18. All funds transferred, both plan-to-plan and company-to-company, were deposited into a master trust account in which funds are commingled for investment purposes with funds from other Armco pension plans.

19. On December 15, 1981, Armco and the USWA executed an agreement addressing several labor issues relative to the acquisition of the Allied coke facility.[4] Paragraph 6.3 and 6.4 of that agreement address pensions and provide in relevant part as follows:

> 6.3 Certain employees or surviving spouses of employees covered by this Memorandum have attained eligibility for or actual [pension] benefits from their previous labor agreements. Armco agrees to preserve those benefits so that any calculation under the Pension Agreement [i.e., the Armco Plan] would not result in those certain employees or surviving spouses of employees receiving a benefit less than they now receive or are entitled to receive. This preservation of existing benefits is not to be construed to permit any employee or surviving spouse of an employee to attain eligibility for such preserved benefits after Armco hires them or their spouses.

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[4] There is presently being litigated before the National Labor Relations Board a dispute, not relevant to this action, between OCAW and Armco concerning whether OCAW or the USWA should represent hourly employees at the coke facility for collective bargaining purposes following the sale. Until that dispute is finally resolved, Armco is recognizing the USWA as the collective bargaining representative of those employees.

6.4 Employees or surviving spouses receiving pensions under the conditions of this Memorandum may have the portion of their pensions earned under their previous labor agreement paid by their previous employer. Final determination of this procedure will be made prior to December 29, 1981.

This agreement was amended on November 3, 1983, but not with respect to pensions.

20. On January 15, 1982, the Benefits Plans Administrative Committee of the Armco Plan approved the pension provisions of the sales agreement and authorized the amendment of the appropriate Armco pension plans to conform to that agreement.

21. Preceding the sale of the coke plant, and extending from early to late December 1981, Allied and OCAW representatives met on a number of occasions. At these meetings, Allied and the OCAW discussed various aspects of the sale. Meetings were held with the plaintiffs' OCAW representatives by Allied on December 23, 1981 and by Armco on December 19, 1981. One purpose of these meetings was to describe pensions and other benefits for Allied employees who went to work for Armco.

22. At the meeting between Allied and OCAW representatives on December 23, 1981, Russell Hawkins, Vice President of Compensation and Employee Benefits, explained what pension benefits Allied hourly employees would be entitled to following the sale. Mr. Hawkins explained that Allied benefits would be "frozen" as of the date of sale, and on a flip chart or chalk board gave various examples showing how Allied and Armco pension credit would be integrated following the sale. No examples given by Mr. Hawkins specifically addressed the issue of how Art. IX(4)(a) would operate after the sale.

23. The OCAW is not a party to the sales agreement. The record does not reflect that Allied provided the OCAW or any plaintiff with a copy of the sales agreement prior to the sale. The record does not reflect that the OCAW or any plaintiff requested a copy of the sales agreement prior to the sale.

24. Before the plant sale, Allied's Ashland managers Gene Moore and Paul Harvey counseled or attempted to contact for

counseling every Allied employee who had attained or would attain 80 points by the sale date, including all those designated in this stipulation as plaintiffs in Groups 2 and 3.

25. Allied representatives informed all those counseled as follows:

a. On December 23, 1981 Gene Moore sent the following letter to those to be counseled:

> Dear Sir:
>
> Please be advised that the sale of the Ashland Plant assets is scheduled for 12/29/81. Due to the fact that you are currently eligible for an immediate pension, I want to make you aware that your earned benefits will be protected by Armco. However, the Armco plan does not provide for a Social Security Option.
>
> If you want to take your pension now and not go to work for Armco, please call me or Paul Harvey in the office or at home before returning to work on Dec. 28 so that we can discuss your situation.

b. At the counseling sessions, those counseled were told that the Allied 80-point pensions for which former Allied employees were eligible before the sale would be preserved by Armco for any such employee hired by Armco within three years following the sale, and would thereafter be payable upon retirement from Armco.

c. At the counseling sessions, those counseled were told that Armco did not have a Social Security option. They were told that if they wished to elect this option, they had to elect it prior to physically going to work for Armco. It was the understanding of Paul Harvey, an Allied representative who counseled the employees, that once an employee began working for Armco, the Social Security option was no longer available to him. It was also Harvey's understanding that an employee who did not retire from Allied, who went to work for Armco, and who then decided to retire from Armco, would not receive the social security option.

d. At the counseling sessions, each employee was given an estimate of what the Social Security option would be if he elected to take the option.

B. GROUP 1 PLAINTIFFS

26. The following Group 1 plaintiffs are former hourly employees of Allied's Ashland, Kentucky coke plant who were within three years of reaching 80 points at the time of the sale of the plant on December 31, 1981: Dan Abrams, Jr.; Fred L. Archey; Clarence Arrowood; Donald Ball; Robert L. Beloat; Charles W. Campbell; Earl Castle; Kenneth R. Coburn; Ted Cordle; Robert E. Damron; Charles C. Diamond; Eugene S. Duncan; Lancan J. Everman; Bob O. Foster; James C. Fuller, Jr.; Glenn Edward Gilbert; L. R. Greene; Charles E. Howard; Joseph M. Ketchesin; James H. Leake; Stanley Lee Leake; Charles J. Phillips; Robert L. Phillips; Jack G. Roark; Carl T. Robinson; Robert Rowe; A. W. Snoddy; Elmer Thompson; Jack C. Van Hoose; Nelson E. Walker; Bobby Gene Watts; Charles F. Wechsler; Allen J. Conley and William Simmons.

27. Group 1 plaintiff Wade F. Rigsby is a former hourly employee of Allied's Ashland, Kentucky coke plant who was not within three years of reaching 80 points at the time of the plant sale. Mr. Rigsby's birth date is 11/22/34 and his Allied employment date is 4/16/56.

28. Until the date of the sale, each plaintiff in Group 1 was employed by Allied at the coke plant.

29. Each plaintiff in Group 1 was offered and accepted employment with Armco as of the date of the sale.

30. Each plaintiff in Group 1 is presently employed by Armco at the coke plant.

31. Plaintiff Robert Rowe applied for an Allied 80-point pension under the provisions of Article IX(4)(a) of the Allied Plan in 1983.

32. Plaintiff Eugene Duncan applied for an Allied 80-point pension under the provisions of Article IX(4)(a) of the Allied Plan on March 3, 1983.

33. Allied denied the pension application of Messrs. Rowe and Duncan in a letter from Frank R. Saunders to Richard M. Bank dated November 18, 1983. It is attached hereto as Exhibit A.

34. The remaining Group 1 plaintiffs applied for an Allied 80-point pension under the provisions of Article IX (4)(a) of the Allied Plan on or about December 1, 1984.

35. Allied denied the pension application for each Group 1 plaintiff on or about February 1, 1985. A copy of the denial letter is attached hereto as Exhibit B.

36. On or about February 27, 1985, counsel for the Group 1 plaintiffs requested that Allied reconsider the denial of the pension claim. A copy of the letter is attached hereto as Exhibit C.

37. Allied reviewed the claim of the Group 1 plaintiffs and upheld the initial denial on or before December 31, 1985.[5] A copy of the letter is attached hereto as Exhibit D.

38. Allied representatives maintain that at one or more meetings with the OCAW, Allied informed the OCAW that it did not consider that termination of Allied hourly coke plant employees as a result of the sale constituted a layoff. OCAW representatives maintain that the layoff issue was not discussed. The parties' notes reflect that the only Group 1 plaintiff present during such meetings was Ted Cordle.

39. Section 2.05(b), of the Sales Agreement, footnote to Item 8, provides that the unreduced accrued monthly pension payable on Normal Retirement Date under the Allied Plan

> shall be and be deemed to be automatically adjusted to reflect any increase accrued after the Closing Date by any person on layoff as of the Closing Date and recalled therefrom after the Closing Date in accordance with the applicable terms of the . . . [Allied Plan] and each reference to Item 8 of Exhibit R in the Agreement shall mean and refer to such adjusted amount whenever appropriate.

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[5] Allied's letters upholding denial of the claims of Group 1 plaintiffs were held up between September 11, 1985 and the present by agreement of counsel, pending outcome of settlement discussions.

Under this provision, Allied employees on layoff as of the date of sale continued to accrue service credit under the Allied Plan, until the date of hire by Armco, up to December 31, 1984.

40. None of the Group 1 plaintiffs has applied to Armco for a pension.

41. None of the Group 1 plaintiffs has filed a grievance with Allied under Article VI of the 1979 labor agreement on the issue of whether he was laid off from Allied employment by virtue of the sale.

42. The OCAW has not filed a grievance with Allied under Article VI of the 1979 labor agreement on the issue of whether Group 1 plaintiffs were laid off from Allied by virtue of the sale.

C. GROUP 2 PLAINTIFFS

43. Group 2 plaintiffs are the following former hourly employees of Allied's Ashland, Kentucky coke plant who were eligible for 80 - point pensions at the time of the sale of the plant on December 31, 1981: John L. Barber; Ishmael R. Brewer; Charles E. Church; Claude Dennison; John D. Griswold; James A. Hayes; Charles Norman King; James C. Kretzer; Everett Lemaster; Kenneth E. Leibee; Mitchell McCalvin; Paul C. Preston; Paul B. Price; Ersel Salyers; Byron Steel, Jr.; Robert L. Thornbury; George E. Walton, Jr.; Clifford Brickey; Clifford Eaton; Gene Gabbard; Jesse Hill; John C. Hite; Everett Kiser; George Lester; Herman McKenzie; Donald Richardson; Carl Stapleton; and Chester Watson.

44. Until the date of the sale, each plaintiff in Group 2 was employed by Allied at the coke plant.

45. Each of the plaintiffs in Group 2 was offered and accepted employment with Armco as of the date of the plant sale.

46. No Group 2 plaintiff applied to Allied for an 80-point pension under the terms of Article IV(2)(a) of the Allied Plan as of December 31, 1981. Each Group 2 plaintiff applied for such pension on or about December 1, 1984.

47. Allied denied the pension application for each Group 2 plaintiff, on or about January 31, 1985. A copy of the denial letter is attached as Exhibit E.

48. Counsel for the Group 2 plaintiffs requested that Allied reconsider the denial of the pension claim. A copy of the letter is attached hereto as Exhibit C.

49. Allied reviewed the claim of the plaintiffs in Group 2 and upheld the initial denial on or before December 31, 1985. [6] A copy of the letter is attached hereto as Exhibit F.

50. As Armco interprets its obligations under the Armco Plan and Section 2.05 of the Sales Agreement, if any Group 2 plaintiff applied for the 80-point pension preserved by Armco under Section 2.05(f)(iii) of the Sales Agreement, he could not receive this pension without retiring from Armco.

51. Group 2 plaintiff Byron Steele, Jr. applied for and received an 80-point retirement benefit and the Social Security leveling option from Armco, effective March 31, 1985.

52. Group 2 plaintiff Gene Gabbard applied for and received an 80-point retirement benefit and the Social Security leveling option from Armco, effective May 31, 1985.

53. Group 2 plaintiff Donald Richardson applied for and received an 80-point retirement benefit and the Social Security leveling option from Armco, effective April 30, 1985.

54. Group 2 plaintiff Chester A. Watson applied for and received a 30-year retirement benefit from Armco, effective September 31, 1985.

55. Group 2 plaintiff Everett Kiser applied for and received a 30-year retirement benefit from Armco, effective April 30, 1985.

56. Group 2 plaintiff Clifford Brickey applied for and received a 30-year retirement benefit from Armco, effective January 31, 1985.

57. The remaining Group 2 plaintiffs have not applied for a retirement benefit from Armco.

D. GROUP 3 PLAINTIFFS

58. Group 3 plaintiffs are the following former hourly employees of Allied's Ashland, Kentucky coke facility who were

[6] Allied's letters upholding denial of the claims of Group 2 plaintiffs were held up between September 11, 1985 and the present by agreement of counsel, pending outcome of settlement discussions.

eligible for 80-point pensions at the time of the sale of the coke facility on December 31, 1981, and who retired from Allied employment on or about that date: Hank C. Conley, Herman Conley, Ralph Fain, Robert L. Garlock, Allen Hogue, Jr., Willy Hughes, Estill V. Martin, Hubert Neace, Floyd M. Penix, James L. Porter, James O. Potter, Curtis E. Puckett, Sheridan E. Sprague, James E. Stambough, Earl Wheeler and James N. Yates.

59. Group 3 plaintiff J. Bowling was not eligible for the Social Security option at the time he retired from Allied employment because he was over age 62.

60. Article VII of the Allied Plan contains a Social Security leveling option, which is available to an employee who takes early retirement under Article IV(2)(a) of the Plan. *See* Background ¶ 5 *supra*.

61. An employee who elects the Social Security leveling option receives pension benefits equal to the amount of his anticipated Social Security benefit plus the pension benefit he would receive when he became eligible for a Social Security benefit; once he becomes eligible for Social Security payments, his pension benefits are reduced by the amount of Social Security received, providing a level income throughout the retirement years.

62. Armco's Pension Plan in effect at the time of the sale of the coke facility did not contain a Social Security leveling option.

63. The Armco management team which negotiated the personnel aspects of the purchase of the coke facility, including pension provisions, consisted of James H. Wallace, Corporate Director of Industrial Relations, assisted by A. C. Worrell, Manager of Employee Benefits, R. L. Mandera, Manager of Employee Benefits Accounting and R. D. Brown, Associate Counsel. Mr. Brown's area of expertise is ERISA, and his responsibilities include advising the Armco pension plans and acting as their legal counsel.

64. Wallace was in charge of this team. Mr. Wallace was responsible for the personnel aspects of the sale of Allied's Ashland plant to Armco, including integration of former Allied employees into the Armco work force and negotiating pension provisions that would apply to the former Allied employees following the sale.

65. On December 1, 1981 at a meeting in Huntington, W.Va., involving Armco and Allied benefits representatives, Armco representatives A. C. Worrell and R. D. Brown advised the Allied representatives that the Armco Pension Plan contained no Social Security leveling option and that, at that time, they did not wish to see such a provision in the Armco Plan because of the difficulty of administering such a provision. Mr. Worrell believes he was "firm in my position that I didn't want to see that [Social Security option provision] carried into the Armco plan" at the Huntington meeting.

66. Neither Worrell nor Brown had reason to believe that his statement at the December 1 meeting respecting the Social Security leveling option was inaccurate.

67. Further discussions were held among Allied and Armco benefits personnel in Middletown, Ohio on December 10, 1981.

68. It is the recollection of R. W. Hawkins that the Social Security leveling option was discussed at the Middletown meeting and that he was advised by Mr. Worrell that Armco did not intend to provide such an option.

69. Mr. Worrell considered that it was Armco's policy not to provide a Social Security option until he learned the contrary sometime in November 1982, when he saw a letter from J. E. Smith, Armco Senior Attorney for Industrial Relations, to Richard Bank dated November 15, 1982. Accordingly, at no time did Mr. Worrell advise any Allied representative that Armco would provide a Social Security leveling option.

70. Mr. Brown was unaware of any Armco policy on provision of a Social Security option following the sale, until he saw the November 15, 1982 letter from J. E. Smith to Richard M. Bank.

71. The Social Security leveling option does not add to the actuarial cost of a pension benefit.

72. To Mr. Brown's knowledge, the Social Security option was never discussed with Armco's Benefit Plans Administrative Committee (BPAC).

73. A memorandum dated December 18, 1981 from Richard T. Allen, Supervisor of Labor Relations at Armco's Ashland Works to J. Edward Maddox, Manager of Human Resources, Ashland Works, states that "Jim Wallace called . . . They [Allied] want

us to pick up their Social Security offset provision but Jim says we are not going to do it since we don't have a similar provision." Wallace has no recollection of this conversation with Allen but does not deny that it occurred.

74. During negotiations for the sale of the coke facility, James Kempf of Allied also advised Mr. Wallace of the existence of the Social Security option and its popularity with Allied employees.

75. On December 21, 1981, J. E. Smith left a telephone message for J. E. Maddox advising that "Allied employees will not have Social Security leveling option available after going to work for Armco."

76. Mr. Smith, who is no longer employed by Armco, did not have the authority to make such a commitment and the record does not disclose what authority, if any, Mr. Smith relied upon in leaving the telephone message.

77. An unsigned Armco memorandum of December 22, 1981, also states that Armco did not intend to provide the Social Security option.

78. The record does not reflect whether or not Wallace ever advised any Allied representative that Armco would provide the Social Security option.

79. At a meeting with the OCAW on December 23, 1981, Mr. Hawkins of Allied detailed the pension aspects of the sale and advised the OCAW representatives that the Social Security option would not be available under the Armco Plan.

80. R. T. Allen of Armco attended the meeting on December 23, 1981 to assure that representations made were accurate.

81. At no time did Mr. Allen take any position contrary to that expressed by Mr. Hawkins in the meeting.

82. Prior to the sale Allied sent certified letters to all employees eligible for early retirement advising them that the Armco Plan contained no Social Security option. *See* background ¶ 25(a) *supra*.

83. Allied individually counseled employees eligible for early retirement that the Social Security option would not be available with Armco.

84. Larry Riel, Director of Employment Benefits at Armco's Ashland Works, was responsible for giving out benefit information at the Ashland plant but was given no instructions on the Social Security option directly from Mr. Wallace or Mr. Worrell.

85. On November 4, 1982, Richard Bank, attorney for John Griswold, addressed a letter to Mr. Riel demanding on behalf of Mr. Griswold, an employee of Armco and a former employee of Allied at the coke facility, that Griswold be permitted to exercise the Social Security leveling option.

86. Mr. Bank also contacted Robert Sand, Allied's Assistant General Counsel. Mr. Bank stated that Griswold claimed entitlement to the Social Security option because he earned it before sale of the coke plant, and that he would take whatever action against Allied would be necessary to vindicate the rights of Mr. Griswold if he were denied the Social Security option.

87. Mr. Sand agreed to contact Armco to discuss whether the Social Security option was payable to Mr. Griswold.

88. Mr. Sand then contacted Mr. Brown of Armco in an attempt to resolve the controversy over Mr. Griswold's right to the Social Security option.

89. At approximately the same time as Griswold's counsel contacted Mr. Sand, he also contacted Armco's corporate headquarters in Middletown, Ohio asserting Mr. Griswold's claim of entitlement to the Social Security option.

90. Sometime during the week and a half following Mr. Bank's November 4, 1982 letter to Mr. Riel, the matter of Mr. Griswold's request came to the attention of Mr. Wallace, who determined that Griswold was entitled to exercise the Social Security option in the light of Armco's commitment in both the sales agreement and the December 15, 1981 Armco/USWA Memorandum [of Understanding] to preserve those pension benefits for which former Allied employees were eligible at the time of the sale. Mr. Wallace's decision was incorporated into the November 15, 1982 letter from J. E. Smith to Richard M. Bank. *See* ¶¶ 69, 70 *supra*.

91. At no time prior to the sale did any Armco representative advise Allied that Armco would provide the Social Security option.

92. According to Mr. Wallace, the first time Armco's Ashland personnel were advised that the Social Security option would be made available was after the Griswold inquiry in the fall of 1982.

93. Armco did not request advice from its actuary on how Social Security option payments should be calculated until January, 1983.

Respectfully submitted,

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Exhibit A

Allied Corporation
Law Department
P.O. Box 2245R
Morristown, New Jersey 07960

November 18, 1983

Richard M. Bank, Esq.
1325 18th Street, N.W. Suite 103
Washington, DC 20036

Re: *Eugene Duncan and Robert Rowe*

Dear Mr. Bank:

This letter responds to your recent letters of September 13, 1983 and October 21, 1983 requesting pension eligibility for the above-referenced individuals under Article IV(2)(a) of the Allied Corporation Hourly Employees' Pension Plan. As explained below, neither Mr. Duncan nor Mr. Rowe is an "employee" so as to be eligible for benefits under the Plan. As a result, the applications for retirement must necessarily be denied.

Background

Both applicants were employees of Allied Corporation at its facility located in Ashland, Kentucky. This facility, as you know, was transferred to Armco in late December, 1981. Incident to the sale, the pension eligibility of participants in the Plan was transferred to a plan of the succeeding employer. As of the date of transfer, persons who had been participants in the Plan ceased their participation therein and became participants in the applicable plan of the succeeding employer. Service with Allied was recognized as credited service under the plan of the succeeding employer.

Pension Eligibility

As of the date of transfer, neither Mr. Duncan nor Mr. Rowe had applied for retirement. Neither had accumulated sufficient service to qualify for a pension under Section IV(2)(a) of the Plan.

Effect of Article IX(4)(a)

Article IX(4)(a) of the Plan, referenced by you states:

"In the event of a layoff [the employee will receive credit for the layoff.]"

No layoff was involved in the above-referenced transfer. Employees who were hired by the purchaser continued to be comparably compensated and continued to work. By virtue of the transfer of funds from the Plan to the appropriate plan of the successor employer, each employee was assured the actuarial equivalent of the value of their benefits immediately preceeding the transfer.

Article IX(4)(a) is inapplicable.

Appeal Rights

Article XII of the Plan sets forth the Appeals Procedure. It is supplemented by Section 503 of the Employee Retirement Income Security Act (ERISA - 29 USC 1133). Neither Article XII nor Section 503 permits a nonparticipant in the Plan to appeal a denial of benefits on the grounds of nonparticipation. Neither Mr.Rowe nor Mr. Duncan is a participant in or beneficiary of the Plan.

CONCLUSION

Notwithstanding the nonparticipant status of Messrs. Duncan and Rowe, Allied has set forth above the specific reason for denial of their claim; i.e., why neither claimant is entitled to benefits from the Plan. Further, Allied does not agree that claimants' assertions are subject to arbitration or any other form of appellate requirement since neither claimant is an employee of the Company or a participant in the Plan.

Allied would again suggest that any claim for a retirement benefit be directed to the present employer of the claimants.

Very truly yours,
/s/ Frank R. Saunders
Frank R. Saunders

bcc: Messrs. Sanderson
Snethen
Brown

Exhibit B

Allied Corporation
P.O.Box 2245R
Morristown, NJ 07960-2245

February 1, 1985

Reference: *Allied Chemical Hourly Employees' Pension Plan*

Dear Sir:

This is to acknowledge your recent letter in which you claim benefits under the Allied Chemical Hourly Employees' Pension Plan. As you no doubt know, Allied has also been served with a complaint in federal court in Kentucky demanding the same benefits. Allied has denied the claim in that lawsuit.

It is similarly our decision to deny the claim made in your letter. There are a number of reasons for this decision. They include the following:

1. Pursuant to our negotiations with OCAW and Armco in 1981 in connection with Armco's purchase of Allied Corporation's Ashland, Kentucky coke plant, the obligation to pay your Plan benefit was assumed by Armco, Inc. (Armco) and the Armco Inc. Pension Agreement Plan (the Armco Plan). The assets required to fund that benefit were transferred from the Allied Plan to the Armco Plan. This action was taken in accordance with Section 3 of Article XV of the Allied Plan. Accordingly, you no longer have an interest and you are no longer a participant in the Allied Plan. Any claim you may have for a pension benefit should be addressed to Armco.
2. In any event you are not entitled to an "80 point pension" because, as of December 31, 1981, you were not laid off from Allied Corporation's employ. See Section 4 of Article IX.
3. Neither Allied Corporation nor the Plan can advise you whether you must retire from Armco's employ to receive a benefit under the Armco Plan.

You should contact representatives of Armco or the Armco Plan in connection with that question.

You or your authorized representative may request Mr. R.W. Hawkins to review this decision. A request for review must be submitted in writing and must be filed within sixty days of your receipt of this letter. In addition, you or your authorized representative may review any pertinent documents and submit issues and comments in writing to Mr. Hawkins for his consideration.

A decision on review normally will be made within sixty days after the date that your request for review is filed. It may be necessary to extend that period, by up to an additional 60 days, in certain cases. If an extension is required, you will be notified of that action.

Sincerely yours,
/s/ J.P. Snethen, Manager
J.P. Snethen, Manager
Employee Benefits

JPS/sp

cc: Richard M. Bank Esquire

Exhibit C

Richard M. Bank
Attorney At Law
1325 18th Street, N.W.
Suite 103
Washington, D.C. 20036
(202) 466-8282

February 27, 1985

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Mr. J.P. Snethen, Manager
Employee Benefits
Allied Corporation
P.O.Box 2245R
Morristown, NJ 07960-2245

Re: *Pension Denial Letters to Plaintiffs in OCAW, et al v. Allied, et al.*

Dear Mr. Snethen:

I have been advised that you have sent pension denial letters to some or all of the individual plaintiffs I represent in *OCAW, et al. v. Allied, et all.* While these denial letters apparently reflect that copies have been sent to me, I have received no copies from Allied. At this point, I do not know precisely to whom such letters were sent, and I request that you immediately supply me with copies of all denial letters sent to plaintiffs in *OCAW v. Allied.*

In the interim, as authorized representative of the plaintiffs, I also request that Mr.R.W. Hawkins review the initial denial of benefits to each such plaintiff, as offered in the denial letters. Finally, I request that you inform me what issues, if any, Allied considers arbitrable should Mr. Hawkins uphold initial benefit denials.

After reviewing all of the denial letters, I will be in further contact with you.

Sincerely,
/s/ Richard M. Bank
Richard M. Bank

cc: Christine Perdue

EXHIBIT D

[DATE]

[Name]
[2nd line of address]
[3rd line of address]
[City, State]

RE: *Request for Review of Denial of Claim Under Allied Chemical Hourly Employees' Pension Plan*

Dear Sir:

Mr. Richard M. Bank has appealed on your behalf the denial of your application for early retirement benefits under the Allied Chemical Hourly Employee's Pension Plan. After reviewing the initial decision, I have determined that the denial of benefits was proper for the reasons stated in Mr. Snethen's letter of February 1, 1985.

As you are neither an employee nor a retiree under the Allied Plan, and you have not raised an issue subject to the Appeals Procedure of Article XII of the Plan, this response will conclude consideration of your claim under the Allied Plan. Should you have any additional facts you believe to be pertinent to your claim, you may submit them to me or to Mr. Snethen along with a request for reconsideration.

Sincerely yours,

Russell W. Hawkins
Staff Vice President
Compensation and Employee Benefits

132/6060

cc: Richard M. Bank, Esquire

Exhibit E

Allied Corporation
P.O. Box 2245R
Morristown, NJ 07960-2245

January 31, 1985

Reference: *Allied Chemical Hourly Employees' Pension Plan*

Dear Sir:

This is to acknowledge your recent letter in which you claim benefits under the Allied Chemical Hourly Employees' Pension Plan. As you no doubt know, Allied has also been served with a complaint in federal court in Kentucky demanding the same benefits. Allied has denied the claim in that lawsuit.

It is similarly our decision to deny the claim made in your letter. There are a number of reasons for this decision. They include the following:

1. Pursuant to our negotiations with OCAW and Armco in 1981 in connection with Armco's purchase of Allied Corporation's Ashland, Kentucky coke plant, the obligation to pay your Plan benefit was assumed by Armco, Inc. (Armco) and the Armco Inc. Pension Agreement Plan (the Armco Plan). The assets required to fund that benefit were transferred from the Allied Plan to the Armco Plan. This action was taken in accordance with Section 3 of Article XV of the Allied Plan. Accordingly, you no longer have an interest and you are no longer a participant in the Applied Plan. Any claim you may have for a pension benefit should be addressed to Armco.

2. You did not elect to retire from Allied while you were still an Allied employee and participant in the Plan, nor did you elect to receive a deferred benefit. When the assets necessary to fund your benefit were transferred to Armco, your entitlement to an 80 point pension was preserved. You were also provided with the opportunity to accrue further service credit which would enhance your

pension benefit. For these reasons, you are neither retired from Allied nor in a vested deferred benefit status under the Allied Plan.

3. Neither Allied Corporation nor the Plan can advise you whether you must retire from Armco's employ to receive a benefit under the Armco Plan. You should contact representatives of Armco or the Armco Plan in connection with that question.

You or your authorized representative may request Mr.R.W. Hawkins to review this decision. A request for review must be submitted in writing and must be filed within sixty days of your receipt of this letter. In addition, you or your authorized representative may review any pertinent documents and submit issues and comments in writing to Mr. Hawkins for his consideration.

A decision on review normally will be made within sixty days after the date that your request for review is filed. It may be necessary to extend that period, by up to an additional 60 days, in certain cases. If an extension is required, you will be notified of that action.

Sincerely yours,

J.P. Snethen, Manager
Employee Benefits

JPS/sp

cc: Richard M. Bank, Esquire

EXHIBIT F

[DATE]

[Name]
[2nd line of address]
[3rd line of address]
[City, State]

RE: *Request for Review of Denial of Claim Under*
Allied Chemical Hourly Employees' Pension Plan

Dear Sir:

Mr. Richard M. Bank has appealed on your behalf the denial of your application for early retirement benefits under the Allied Chemical Hourly Employees' Pension Plan. After reviewing the initial decision, I have determined that the denial of benefits was proper for the reasons stated in Mr. Snethen's letter of January 31, 1985.

As you are neither an employee nor a retiree under the Allied Plan, and you have not raised an issue subject to the Appeals Procedure of Article XII of the Plan, this response will conclude consideration of your claim under the Allied Plan. Should you have any additional facts you believe to be pertinent to your claim, you may submit them to me or to Mr. Snethen along with a request for reconsideration.

Sincerely yours,

Russell W. Hawkins
Staff Vice President
Compensation and Employee
Benefits

132/6060

cc: Richard M. Bank, Esquire